MUI BANK BHD.

v.

CHEAM KIM YU

SUPREME COURT, KUALA LUMPUR
HARUN HASHIM SCJ
MOHD. JEMURI SERJAN CJ (BORNEO)
WAN YAHYA J
[SC CIVIL APPEAL NO. 02-411-90]
5 SEPTEMBER 1992

LAND LAW: *Sale of Land - Auction - Auction sale completed in favour of bona fide purchaser for value without notice of sale by private treaty - Whether sale by auction or sale by private treaty should stand - Whether Judge functus officio after order for sale made - National Land Code 1965 ss. 256(1), (2), (3), 257.*

In this case, the respondent charged his property to the appellant on 23 September 1985 as security for the loan. The charge was registered. As the respondent failed to repay the loan, the appellant obtained an order on 29 August 1988 for sale and the auction sale was at last successfully completed on 24 March 1990. The property was knocked down to the bidder Ng and the Registrar accordingly issued the certificate of sale by Court under s. 259 of the National Land Code on 14 June 1990.

Whilst the above-mentioned proceedings were in progress, the respondent and one Beh Sai Ming (Beh, the intervener) entered into a private treaty on 27 February 1990 with the consent of the appellant/bank and the property was sold for RM105,000 to Beh. He paid a sum of RM10,500 to the bank's solicitors on 9 February 1990 being 10% of the purchase price and the balance sum of RM94,500 was to be paid to the bank's solicitors within three (3) months of 27 February 1990 and subsequently an extension of one (1) month was given to Beh to settle the balance sum of the purchase price.

By a letter dated 17 May 1990 Beh's solicitors gave notice to the appellant/bank that he intended to restrain the transfer of the property to the bidder Ng. By another letter dated 11 June 1990 Beh's solicitors sent a reminder to the appellant that they would apply to set aside the auction sale. Finally, on 13 June 1990 Beh's solicitors forwarded a cheque for RM94,500 in favour of the appellant to the appellant's solicitors.

By a summons in chambers dated 22 June 1990, Beh applied to the Court to intervene in the proceedings and for an order that the order for sale be set aside. On 25 March 1990, the learned Judge made the following orders:

(a) Leave to Beh to intervene;

(b) the title of the action be amended to include Beh as intervener;

(c) the public auction sale of the land held on 24 March 1990 be set aside;

(d) the appellant/bank to refund to bidder Ng the purchase price within 30 days; and

(e) the appellant/bank to pay the costs of Beh's application.

The appellant/bank being dissatisfied with the decision of the High Court appealed against the whole of the decision to the Supreme Court. The question in this appeal was, which sale should stand, in fact and in law.

Held:

[1] The application for an order for sale by the chargee appellant/bank was properly made under s. 256(1) and (2) and the Court correctly granted the order on 29 August 1988 under ss. 256(3) and 257 of the National Land Code. The procedure prior to the sale under s. 258 of the National Land Code was also complied with.

[2] The learned Judge was clearly *functus officio* after he made the order for sale on 29 August 1990. In this case, the order for sale was made, drawn up and perfected and the learned Judge was *functus officio* and therefore had no power to set aside the order for sale which was a final order.

[3] The sale by private treaty, though not prohibited by the National Land Code, did not confer any superior interest in the land in the intervener against the indefeasible interest of the bank conferred by s. 340(1) unless such interest was made defeasible on account of forgery or illegality on the past of the bank under s. 340(2) of the National Land Code.

[4] For the reasons stated, the appeal was allowed with costs and orders of the learned Judge was set aside.

[Appeal allowed with costs. Orders of the learned Judge set aside. Deposit to be refunded to appellant.]

[**Bahasa Malaysia** Translation of Headnote]

UNDANG-UNDANG TANAH: *Penjualan tanah - Lelongan - Jualan Lelong di laksanakan melalui persetujuan bersama untuk manafaat pembeli bona fide dengan nilai tanpa notis - Samada jualan lelong atau jualan melalui persetujuan bersama harus dipakai - Samada hakim functus officio setelah membuat perintah jualan - Kanun Tanah Negara 1965, ss. 256,(1), (2), (3), 257.*

Dalam kes ini, responden menggadaikan hartanya kepada perayu pada 23 September 1985 sebagai jaminan bagi pinjaman. Gadaian tersebut adalah didaftarkan. Oleh kerana responden gagal membayar balik pinjaman, perayu telah mendapatkan suatu perintah pada 25 Ogos 1988 untuk menjual dan jualan lelong tersebut akhirnya berjaya dilaksanakan pada 24 Mac 1990. Harta tersebut dijual kepada pembida Ng dan selaras dengan itu Pendaftar mengeluarkan Sijil Perakuan Jualan oleh Mahkamah di bawah s. 259 Kanun Tanah Negara pada 14 Jun 1990.

Sementara prosiding tersebut berterusan, responden dan seorang Beh Sai Ming (Beh, pencelah) mengikat suatu triti persendirian pada 27 Februari 1990 dengan persetujuan perayu bank dan harta tersebut dijual pada harga RM105,000 kepada Beh.Beliau membayar wang berjumlah RM10,500 kepada peguamcara bank pada 7 Februari 1990 yang merupakan 10% daripada harga belian dan jumlah wang baki sebanyak RM94,500 harus dibayar kepada Peguamcara bank dalam masa tiga (3) bulan mulai dari 27 Februari 1990. Kemudiannya suatu lanjutan selama satu (1) bulan telah diberikan kepada Beh untuk menyelesaikan jumlah wang baki harga belian tersebut.

Melalui surat bertarikh 17 Mei 1990 Peguamcara Beh memberikan notis kepada perayu/bank bahawa beliau berhasrat untuk menghalang pindahmilik harta kepada pembida Ng. Melalui surat bertarikh 11 Jun 1990 Peguamcara Beh menghantar suatu peringatan kepada perayu bahawa mereka akan memohon untuk mengetepikan jualan lelong tersebut. Akhirnya, melalui surat bertarikh 13 Jun 1990 Peguamcara Beh memajukan sekeping cek sebanyak RM94,500 untuk faedah perayu kepada Peguamcara perayu.

Melalui saman dalam kamar bertarikh 22 Jun 1990, Beh memohon kepada Mahkamah untuk mencelah dalam prosiding dan untuk suatu perintah bahawa perintah jualan diketepikan. Pada 25 Mac 1990, Hakim yang bijaksana tersebut telah menbuat perintah-perintah berikut:

(a) kebenaran kepada Beh untuk mencelah;

(b) tajuk tindakan dipindah untuk memasukkan Beh sebagai pencelah;

(c) jualan lelongan awam tanah tersebut yang telah diadakan pada 24 Mac 1990 diketepikan;

(d) Bank/perayu hendaklah memulangkan semula harga belian tersebut kepada Ng dalam tempoh 30 hari; dan

(e) Bank/perayu hendaklah membayar kos permohonan Beh.

Perayu/bank yang tidak berpuashati dengan keputusan Mahkamah Tinggi membuat rayuan terhadap keseluruhan keputusan tersebut kepada Mahkamah Agung. Persoalan dalam rayuan ini adalah jualan manakah yang harus kekal, dari segi fakta dan undang-undang.

Diputuskan:

[1] Permohonan untuk suatu perintah jualan oleh pemegang gadaian perayu/bank telah dibuat di bawah s. 256(1) dengan sah dan (2) Mahkamah dengan betul telah memberikan perintah pada 29 Ogos 1988 di bawah s. 256(3) dan 257 Kanun Tanah Negara. Prosedur sebelum jualan di bawah s. 258 Kanun Tanah Negara juga telah dipatuhi.

[2] Hakim yang bijaksana tersebut adalah *functus officio* selepas beliau membuat perintah jualan tersebut pada 29 Ogos 1990. Dalam kes ini, perintah untuk jualan telah dibuat dan telah dilaksanakan dan disempurnakan dan Hakim yang bijaksana tersebut adalah *functus officio* dan oleh yang demikian tidak mempunyai kuasa untuk mengetepikan perintah jualan yang mana merupakan suatu perintah muktamad.

[3] Penjualan melalui triti persendirian, walaupun tidak dihalang oleh Kanun Tanah Negara, tidak menganugerah kepentingan yang berlebihan dalam tanah tersebut kepada pencelah bila berbanding dengan kepentingan di bawah s. 340(1) melainkan kepentingan ini disangkal kerana fraud, pemalsuan ataupun kepenyalahan undang-undang yang dilakukan oleh bank di bawah s. 340(2) Kanun Tanah Negara.

[4] Atas sebab-sebab yang dinyatakan, rayuan tersebut telah dibenarkan dengan kos dan perintah Hakim yang bijaksana itu telah diketepikan.

[Rayuan dibenarkan dengan kos. Perintah-perintah Hakim yang bijaksana diketepikan. Deposit hendaklah dipulangkan kepada perayu.]

Case referred to:
Hock Hua Bank Bhd. v. Sahari bin Murid [1981] 1 MLJ 143 ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 25
National Land Code 1965, ss. 256(1), (2), (3), 257, 258, (2)(a), 259, (3), 267, 340(1), (2); Form 16D 16F
Real Property Gains Tax Act 1976, s. 12(5)

For the appellant - Ngan Siong Hing; M/s. Abbas & Ngan
For the respondent - Ramesh Sanghvi: M/s. Kassim Tadin, Wai & Co.

JUDGMENT

Harun Hashim SCJ:

Cheam Kim Yu (Cheam) is the registered owner of land held under HS(D) LP513/83 PT No. 1054 in the Mukim of Hutan Melintang, Perak. He obtained a loan of RM95,000 from Malayan United Bank Bhd., now known as MUI Bank Bhd. (the bank) and as security for the loan charged the land to the bank on 29 September 1985. The charge was registered. Cheam failed to repay the loan. The bank sent the statutory notice in Form 16D of the National Land Code dated 5 January 1987 to Cheam to remedy the breach. The said notice expired on 4 February 1987. Cheam failed to remedy the breach. As at 31 January 1987 the outstanding balance of the loan was RM124,061.73 with interest to be calculated at the rate of 14.75% p.a. at yearly rests.

On 16 May 1987 the bank applied to the Court for an order for sale of the charged land under s. 256. On 29 August 1988 the Court granted the order for sale and the auction date to be held on 16 November 1988. Then several applications followed. On 6 March 1989 the Court fixed the reserved price at RM100,000 and 27 May 1989 to be the new auction date as the valuation report was not ready for the first auction date. There were no bidders and the auctioneer recommended that the reserved price be reduced to RM90,000. This was allowed by the Court on 16 October 1989 and a new auction date was fixed for 29 November 1989. The auction was not carried out and a new auction date was fixed for 27 January 1990. The auction again was abortive and a new date was fixed for 24 March 1990. This auction was successful and the property was knocked down to Ng Choon Meng (Ng) for RM110,350. The full purchase price was paid by Ng and the Registrar accordingly issued the certificate of sale by Court under s. 259 on 14 June 1990.

It appears that whilst the abovesaid proceedings were going on, other events were taking place. In January 1990, Cheam approached Beh Sai Ming (Beh) and offered to sell the charged land to Beh at the price of RM105,000. Beh agreed. He was also told that as the land was charged to the bank and as the purchase price was insufficient to pay off the outstanding loan in full they had to obtain the consent of the bank for the sale. They both went to see the branch manager of the bank at Bidor who said he had to obtain clearance from his Head Office. By letter dated 23 January 1990, the Bidor branch manager wrote to Cheam as follows:

> MUI BANK BHD.
> 23 January 1990
> Our ref: BDR/84/16
> Mr. Cheam Kim Yu
> 1, Parit 23 Batu 13
> 36400 Hutan Melintang
> Hilir Perak,
> Perak
>
> Dear Sir,
>
> Re: **Term Loan No. TL85/10 for RM95,000 outstanding balance as at 22 January 1990: RM210,907.11 dr**
>
> We refer to the above and take pleasure to inform that we are agreeable to your proposal to dispose the charged property held under Title No. HS(D) LP 513/83 PT No. 1054, Mukim of Hutan Melintang by private treaty for RM105,000 but subject to the following conditions:
>
> (1) The amount owing after disposal of the charged property is to be remained in the existing term loan account. You are to execute a letter of arrangement to this effect.

(2) The shortfall after disposing the charged property is repayable by 120 monthly instalments on condition that the whole principal amount becomes payable and that the bank has the liberty to apply the bankruptcy action against you if you default in the repayment.

(3) The interest rate chargeable on the shortfall is 2% + BLR p.a. (Our BLR is currently at 7.0% p.a.)

All other terms and conditions in our previous letter of offer dated 3 April 1985 remain unchanged.

Kindly indicate your acceptance by signing and resuming the copy of this letter to us. Please note that if we do not receive any response from you within fourteen (14) days from the date hereof, we shall henceforth treat the above arrangement as automatically cancelled and proceed with the bankruptcy proceedings.

Yours faithfully
for MUI Bank Bhd. Bidor branch.

Sgd. Gan Ching Lock
Branch Manager.

c.c. Banking Operations Division Zone I.
c.c. M/s. Abbas & Ngan,
Advocates & solicitors.
(Your ref: NSH/fid/6478/87 MUBB(3).

In the event, on 27 February 1990 Cheam and Beh entered into a sale and purchase agreement of the charged land together with a shophouse thereon for the sum of RM105,000. Beh had paid a sum of RM10,500 to the bank's solicitors on 9 February 1990 being 10% of the purchase price which was sent to the bank by letter dated 12 February 1990. The balance sum of RM94,500 was to be paid to the solicitors of the bank within three months of 27 February 1990. On execution of the agreement, a copy of which was sent to the bank by its solicitors on 6 March 1990, Cheam delivered vacant possession of the property to Beh. By letter dated 23 May 1990, Cheam agreed to extend the completion date by one month. By letter dated 17 May 1990 Beh's solicitors gave notice to the bank that he intended to restrain the transfer of the property to the purchaser at the public auction. As no reply was received the solicitors sent a reminder by letter dated 11 June 1990 that they would apply to set aside the auction sale. By letter dated 13 June 1990 Beh's solicitors forwarded to the bank's solicitors, a cheque for RM94,500 in favour of the bank.

By summons in chambers (in the originating summons for an order for sale by Court) dated 22 June 1990, Beh applied to the Court to intervene in these proceedings and for an order that the order for sale be set aside. On 25 August 1990 the learned Judge made the following orders:

(a) Leave to Beh Sai Ming to intervene;

(b) The title of the action be amended to include Beh as intervener.

(c) The public auction sale of the land held on 24 March 1990 be set aside.

(d) The bank to refund to Ng Choon Meng the purchase price within 30 days; and

(e) The bank to pay the costs of Beh's application.

The bank being dissatisfied with that judgment now appeals to us against the whole of the judgment on the following grounds:

(1) The learned Judge was *functus officio* when he made, the orders on 25 August 1990;

(2) If the learned Judge was not *functus officio*, he could not in any event set aside the auction sale because the sale had been completed in favour of a *bona fide* purchaser for value without notice of the sale by private treaty; and

(3) Non-compliance with s. 25 of the Courts of Judicature Act 1964.

Now, the application for an order for sale was made on 16 May 1987 and the Court granted the order on 29 August 1988. After three previous dates had been fixed for the auction and either abandoned or aborted, the Court ordered the auction to be held on 27 January 1990. However, before that auction date, Cheam and Beh had entered into negotiations to sell and purchase the land by private treaty and the bank gave its consent on 23 January 1990 following which a sale and purchase agreement was executed on 27 February 1990. The auction sale which was to be held on 27 January 1990 was aborted and a new date was fixed for the auction to be held on 24 March 1990 which was successfully held. By then, however, Beh had paid 10% of the purchase price which was accepted by the bank. It will be seen that up to the end of 1989, the bank was following up on its original application to the Court that the land be sold by public auction. The confusion in this case arose in January 1990 when the bank agreed to a sale by private treaty whilst at the same time pursuing its application for sale by the Court. In the event both courses of action succeeded.

The question then, in fact and law, which sale should stand. The learned Judge decided in favour of the sale by private treaty on the grounds that:

(a) he was not *functus officio* for so long as the auction sale has not been completed because the Court has the power to vary the auction date and make other interlocutory orders;

(b) a separate action by Beh against the bank to set aside the public auction is not required, to avoid multiplicity of proceedings and therefore it was proper for Beh to intervene in the present proceedings initiated by the bank;

(c) the chargee bank had agreed to the sale by private treaty before the public auction and it should not have proceeded with the public auction. A *fortiori*, the sale by private treaty was by consent of all three parties, *viz.* the chargor, the chargee and the purchaser whereas the sale by public auction was without the consent of the chargor. Furthermore, the conflicting situation created in the instant case was solely the doing of the bank.

What then are the rights of the parties and the powers of the Court in the present case.

The application for an order for sale by the chargee bank was properly made under s. 256(1) & (2) and the Court correctly granted the orders under s. 256(3) & 257. The procedure prior to sale under s. 258 was also complied with. The sale under s. 259 is subject to the conditions of sale prescribed under s. 258(2)(a) and the directions for sale made by the Court on 6 December 1988. Paragraph 5 of the directions for sale states:

> The purchase price or the balance of the purchase price as the case may be paid into the Court and for payment out of same as follows:
>
> (i) to the State or Local Authority any rent or other outgoings payable;
>
> (ii) to the Director General of Inland Revenue a sum calculated at the rate at which the tax is payable by the defendants under s. 12(5) of the Real Property Gains Tax Act 1976;

(iii) all costs of and incidental to this application and of the sale and the remuneration of the licensed auctioneer and appraiser as taxed by the Senior Assistant Registrar;

(iv) to the plaintiffs all monies due under the charge at the time of the sale.

However, condition 11 of the conditions of sale states:

> The balance of the purchase money shall be paid in by the purchaser within Ninety (90) days from the date of the sale to the vendor's solicitors, Messrs. Abbas & Ngan. Upon payment of the balance purchase money, the purchaser shall be let into possession of the receipt of the rents and profits of the property. For the purpose of the completion of the purchase and payment of the balance purchase money time shall be the essence of the contract.

In the event, the purchaser (Ng Choon Meng) paid the purchase price to his solicitors (M/s. Chia Kay Joo & Co.) who in turn by letter dated 16 May 1990 forwarded the balance sum of RM99,315 to the bank's solicitors (M/s. Abbas & Ngan). It was therefore contended that the auction was irregular and hence void. Condition of Sale No. 11 would appear to be contrary to the directions of sale issued by the Court and s. 259(3) which provides:

> The purchaser at the sale shall, upon payment to the said officer of the full amount of the purchase price, ...

There is, however, no evidence that the bank's solicitors did not pay into Court the balance of the purchase price. On the other hand the Registrar would not have issued the certificate of sale by Court in Form 16F under s. 259 whereby she certified the receipt of the purchase price, if the money had not been paid into Court. It was also contended that as the issue document of title was not delivered to the Registrar one week before the auction date as required by the directions of sale this also vitiated the auction sale. Form I6F makes provision for such an eventuality, and this is what the Registrar certified. We think there is no merit in these arguments. We are accordingly of the view that the auction sale was properly conducted in accordance with the provisions of the National Land Code to which we have referred and the certificate of sale issued on 14 June 1990 is a valid registrable instrument under s. 267.

Under the National Land Code, there is nothing to prevent a chargor with the consent of the chargee to sell the charged property by private treaty. There are no specific provisions in the Code for such a sale but if such a sale is concluded as a purely business arrangement, it is for the chargee to discharge the charge to give full effect to the sale. That was not done here, although the bank must have been aware that it had instructed solicitors to apply to the Court for an order for sale of the land by public auction and yet subsequently had given approval for the land to be sold by private treaty to Beh. The sale by private treaty here however did not confer any superior interest in the land in Beh against the indefeasible interest of the bank conferred by s. 340(1) unless such interest is made defeasible on account of fraud, forgery or illegality on the part of the bank under s. 340(2). If Beh wishes to press on with his claims, then he should do so in a separate action: see *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 143.

The application to intervene in the present proceedings was not made until a week after the issue of the certificate of sale by which time the auction sale was completed. The learned Judge was clearly *functus officio* by then. Indeed, following *Hock Hua Bank Bhd. v. Sahari b. Murid* (*supra*) the learned Judge was *functus officio* after he made the order for sale on 29 August 1988. In the *Hock Hua* case, the allegations of fraud and forgery were made after the Judge had made the order for sale but before the auction sale and the Federal Court held that the Judge was *functus officio* after he made the order for sale in foreclosure

proceedings when the order had been drawn up and perfected. True, after making an order for sale, the Judge has the power to make other orders including changes in the reserve price and the auction sale dates but such orders are consequential to the order for sale. The point here is that the order for sale is a **final order** unless appealed against. Once the order for sale is made, drawn up and perfected, as here, the learned Judge is *functus officio* and therefore has no power to set aside the order for sale.

Section 25 of the Courts of Judicature Act 1964 deals with the powers of the High Court which have been adequately dealt with in this judgment and we need say no further.

For the reasons stated, we would allow the appeal with costs here and below. The orders of the learned Judge are set aside.

Deposit to be refunded to the appellant.

Also found at [1992] 4 CLJ 2229